THEORETICAL AND PRACTICAL DIFFICULTIES IN REGULATING INSIDER TRADING IN SOUTH AFRICA AND POSSIBLE MECHANISMS OF IMPROVEMENT OF SHORTCOMINGS IN THE REGULATORY FRAMEWORK

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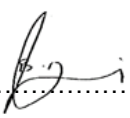

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CHAPTER 1
INTRODUCTION

1.1 INTRODUCTION AND BACKGROUND

Anti-insider trading provisions were initially enacted to inter alia; enhance confidence in South African financial markets by contributing to the maintenance of a stable financial market environment and by promoting international competitiveness of investors in securities services in the country.[1]

In attempts to determine whether the Insider trading regulations are indeed effective at deterring insider trading contraventions as well as at enforcing contraventions thereof, this thesis will subsequently examine the relevant legislation which pertains to insider trading in South Africa as well as analyse any definitional ambiguities and difficulties caused therein. Wherefore other than where the definitions in the legislation is lacking at enabling and encouraging certainty and unambiguous interpretations thereof, the research will further discuss what additional problems are drawn from the current legislative insider trading framework.

Inclusive of the theoretical difficulties relating to the regulation and punishment of insider trading are the defences available to an insider provided in the Financial Markets Act[2] to escape liability. Part of the difficulties that may arise when trying to prove that one has actually committed the prohibition is having to demonstrate that one had inside information at the time of trading or that one was aware that such information came from an insider as this mostly relates and is reliant on the insider's subjective mind and actions.[3] Further flaws in the legislation will accordingly be evaluated and address in the research.

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[1] Cassim "Some Aspects of Insider Trading-Has the Securities Services Act 36 of 2004 Gone too Far" 2007 *SA Merc LJ* 19 44.
[2] Financial Markets Act 19 of 2012.
[3] Jooste "A Critique of the Insider Trading Provisions of the 2004 Securities Services Act" 2004 *SALJ* 443.

An analysis will be done regarding the difficulties experienced by the Financial Sector Conduct Authority (hereafter the FSCA) as the entity responsible for the supervision of compliance with market abuse provisions[4] in discharging of its duties as a result of the current legislation and/or the lack of clarity therefore. Any additional reasons that may hinder the FSCA's effectiveness in terms of its duties and the main aims of the enactment of insider trading provisions will also be addressed.

A comparative study will consequently be conducted in the research to establish how Australia has arguably become acknowledged to have the most progressive and developed market abuse legislation in the world[5] compared to that of South Africa. Ultimately, recommendations will be presented using the above comparisons on what mechanisms can be adopted to improve on South Africa's regulation of insider trading.

1.2. THE ADVANCEMENT OF INSIDER TRADING REGULATION IN SOUTH AFRICA

It is generally agreed that the regulation of insider trading was first introduced in terms of section 233 of the Companies Act, 1973.[6] In terms of these provisions, a number of definitions were introduced for the purpose of enforcing insider trading and other related provisions of the Companies Act.[7] The scope of the section was however only limited to insider trading by primary insiders, no mandatory disclosure requirements existed and due to the fact that insider trading only attracted criminal liability, the burden of proving the contravention beyond reasonable doubt[8] lead to a cumbersome burden of proof when it came to the contravention. These provisions therefore contained a number of flaws which lead to challenges being experienced in the application of the legislation.

Wherefore in attempts to remedy or improve on the flaws observed in section 233 as mentioned, section 440F was enacted which repealed and replaced section 233.

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[4] Section 84 of the Financial Markets Act 19 of 2012. Hereafter the FMA.
[5] Chitimira "The Regulation of Insider Trading in Australia: A Historical and Comparative Analysis" 2015 *Speculum Juris* Volume 29 86.
[6] Section 233 of the Companies Act 61 of 1973.
[7] Chitimira "A Historical Overview of the Regulation of Market Abuse in South Africa." 2014 *PER/PERL* 17(3) 946.
[8] See s 233 of the Companies Act 61 of 1973.

Section 440F stated that “Any person who, whether directly or indirectly, knowingly deals in a security on the basis of unpublished price sensitive information, shall be guilty of an offence if the information has been obtained by virtue of a relationship of trust or other contractual relationship or through espionage, theft, bribery, fraud, misrepresentation or other wrongful method, irrespective of the nature thereof.”

Though section 440F was an improvement on section 233, it still fell short in certain instances such as the uncertainty as to whether a transaction in contravention of section 440F was void or voidable. The section further came under fire for having largely adopted American principles on insider trading without proper regard to the South African circumstances.[9] It was then clear that specific legislation relating to insider trading would have to be enacted to assist with broadening the scope of the prohibition of insider trading.[10]

The Insider Trading Act 35 of 1998 (The Insider Trading Act) then came into operation in 1999. Although it repealed section 440F with effect from 17 January 1999, section 87 of the Securities Services Act 36 of 2004 provided that, notwithstanding such repeal, offences in terms of section 440F allegedly committed prior to their repeal are to be investigated by the Financial Services Board in terms of the section, whilst exercising the powers accorded to it by section 82 of Act 36 of 2004 and in relation to such investigations, the Panel may disclose to the Board all information in its possession relating to any such offence.[11]

The Insider Trading Act additionally had various definitional flaws and created a wide range of exclusions which likewise hindered the sufficiency of the legislation. The focus of the definition on “individuals” as insiders clearly implied that juristic persons were excluded and thus the scope was too limited.[12] Additionally, encouraging or discouraging another person to deal in or from dealing in securities was now prohibited and what constituted the offence was not distinctly and expressly stated.[13]

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[9] Chitimira 2014 *PER/PERL* 950.
[10] *Idem* 955.
[11] Delport “Henochsberg on the Companies Act 61 of 1973” 2010 *SA Merc LJ* 976.
[12] Chitimira 2014 *PER/PERL* 956.
[13] *Idem* 958.

Wherefore the Securities Services Act 36 of 2004 (The Securities Services Act) was then enacted. This Act then broadened the definition of an insider to include juristic persons by replacing the term “individual” with “person”. Even though a company selling its shares may be excluded from the definition of an insider, when repurchasing its own shares it is argued that it should be considered as such in those instances.[14]

The Securities Services Act however failed to make provision for instances where offenders executed an offending trade on behalf of a third party while suspecting that the third party was an insider.[15] Additionally, certain flaws that will be addressed in terms of the current legislation which pertain to insider trading were merely adopted from the Securities Services Act and no attempts were made to improve on the downfalls already experienced from and as a result of its predecessor.

Today, insider trading is predominantly regulated in terms of Section 78[16] of the Financial Markets Act 19 of 2012.

Section 79[17] however, rather than defining what constitutes inside information; proceeds to describe what does not constitute inside information thus resulting in a process of elimination during the application of the definition of insider trading.

1.3. RESEARCH PROBLEM AND MODUS OPERANDI

Insider trading was initially formally prohibited in South Africa through the enactment of the Insider Trading Act which came into effect on 17 January 1999.[18] Since then, various reforms have been made and legislation repealed and enacted to further cater for and effectively deter and enforcement insider trading in South Africa. Various authors however argue how effective these changes have been at creating legitimate reforms in terms of market abuse prohibitions and whether or not they have at all contributed to a significant increase in the deterrence of the prohibition and in the number of offenders successfully being prosecuted in this regard.

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[14] Cassim 2007 *SA Merc LJ* 55.
[15] Kruger “The Regulation of insider trading on the JSE: A comparative study with Hong Kong” 2014 18.
[16] Section 78 of the FMA.
[17] Section 79 of the FMA.
[18] Insider Trading Act 135 of 1998.

1.4. THE OBJECT OF THE STUDY

The primary research that needs investigation is: How effective is the current South African legislation at combating insider trading and what mechanisms or provisions can be adopted from foreign law to better the legalisation and its practical application in the country? The main inquiry of the thesis, therefore is to explore whether or not the current insider trading legalisation in South Africa has been effective at enabling a seamless interpretation of the legislation and prosecutions of the prohibition or whether issues in the legislation have rather lead to ambiguity regarding a number of definitions in the legislation, uncertainty in terms of the legislation's interpretation and practical application as well as whether it has also caused unnecessary difficulties in the prosecution of insider trading by the Financial Sector Conduct Authority[19] and the courts. Wherefore foreign law for comparative purposes will be utilised as guide to establish what measures may be adopted by South Africa to either prevent or mitigate any of the problems previously established by the South African Insider Trading legalisation already addressed in the research, to better assist with achieving its purpose and main reasons for enactment.

1.5. RESEARCH QUESTIONS

The research question will be answered by analysing the current legislation which governs insider trading in South Africa and comparing that with foreign law to establish what mechanisms can be adopted therefrom.

In this research, the following issues will be addressed:

(1) Definitions which pertain to and surround the concept of insider trading in South Africa.
(2) The South African legislation as whole that governs insider trading.
(3) The current statistics of successful prosecutions by the courts and enforcements by the Financial Sector Conduct Authority of insider trading activities by alleged offenders.

[19] Previously called the Financial Services Board incorporated in terms of the Financial Services Board Act 97 of 1990 now called the Financial Sector Conduct Authority incorporated in terms of the Financial Sector Regulation Act 9 of 2017 (hereinafter referred to as the FSR Act).

(4) The Financial Sector Conduct Authority's role in the supervision and enforcement of insider trading activities in South Africa.
(5) Insider trading legislation of Australia compared to that of South Africa.

1.5.1. Insider trading and insiders

As previously stated insider trading is defined in section 78(1)(a) of the Financial Markets Act as *"*an insider who knows that he or she has inside information and who deals directly or indirectly or through an agent for his or her own account in the securities listed on a regulated market to which the inside information relates or which are likely to be affected by it*".*

An insider is however defined in section 77 of the Financial Markets Act [20] as *"*a person who has inside information through, either being a director, employee or shareholder of an issuer of securities listed on a regulated market to which the inside information relates or due to having access to such information by virtue of employment, office or profession or where such person knows that the director or indirect source of the information was an insider*".*

Compliance with the above definitions is therefore essential in proving whether one has either committed the offence or not. It is thus essential to determine who qualifies as an insider and what constitutes inside information. The legislation has significant flaws which remain even after the various re-enactments thereof and has in fact spawned additional flaws following the re-enacted legislative frameworks.[21] Jooste commented on the definitions of an insider and inside information as it stood in terms of the Securities Services Act[22] as adopted by the Financial Markets Act to say that they are both cumbersome and counter-intuitive.[23] These definitions to date, continue to bounce off each other with no clear resolution. In order to be an insider, one needs to have inside information but one can only be an insider if they already have inside

[20] Section 77 of the FMA- definitions.
[21] Jooste 2004 *SALJ* 437.
[22] Securities Services Act 36 of 2004.
[23] Jooste 2004 *SALJ* 438.

information.[24] Author argues that this confusion can be said to attribute to the difficulties in the interpretation and adequate determination of the concept of insider trading.

Inside information must have been information which was obtained from an insider. In instances where the information was obtained from an outsider who is not considered an insider, the information obtained would therefore fall outside the definition and thus one would not have committed the offence of insider trading.[25] This exclusion may have left room for abuse as price sensitive information which was unintentionally leaked by insiders to outsiders and subsequently received from the outsiders and used to deal in securities may ultimately not be covered by the definition and could thus still be used to abuse insider trading activities.[26]

The secondary research questions that flow from the primary research question are:

(1) What definitional issues are experienced due to the current South African Insider trading regulations?

(2) What other challenges exist in the current legislation governing insider trading and do these challenges contribute to any difficulties in the legislation's interpretation and application?

(3) What practical issues are experienced by the Financial Sector Conduct Authority in it attempts to regulate and penalise insider trading, either due to the current legislation or otherwise?

(4) What legislation governs insider trading prohibitions in Australia which have contributed at making their regulation of insider trading more effective than South Africa and which of these mechanisms may be adopted by South Africa in its legislation and practical application to better regulate insider trading in the country?

[24] Luiz and van der Linde "The Financial Markets Act of 2012: Some Aspects on the Regulation of market abuse." 2013 25 *SA Merc LJ* 459.
[25] Chitimira 2014 *PER/PERL* 957.
[26] *Ibid* 957.

1.6. RESEARCH METHODOLOGY AND CHAPTER DIVISIONS

The methodology proposed will comprise of a qualitative analysis and in-depth study on available literature to better understand the current legislation that governs insider trading as well as the possible downfalls of the legislation. Additionally, the research will then take on a comparative study of foreign law to assess the effectiveness of Australia's regulation of insider trading and to establish which of these mechanisms and/or provisions may be adopted in South Africa's legislation and practical application. In this research, primary sources that will be utilised will include legislation, case law and journal articles. Secondary sources will include personal opinions, primary source reviews and commentary as well as academic literature such as textbooks.

The research will explain the concept of insider trading and provide a discussion on the legislation used to regulate this as well as the difficulties in regulating insider trading that arise from the legislation itself. The South African legalisation will then be contrasted with that of Australia to establish how this country regulates insider trading and whether any mechanisms can be adopted from it to better regulate insider trading in South Africa. A further literary review will be conducted to evaluate the problems the Financial Sector Conduct Authority experiences in the practical application of the legislation as a result of these flaws and whether any additional issues may exist that may be unrelated to the legislation itself.

The chapters will be structured as follows:

- Chapter 2 will address further problematic definitions relating to the insider trading regulations as well as the complexities brewed therefrom.
- Chapter 3 will address the provisions of the legislation used to regulate insider trading and the defences thereof. This chapter will go further to identify the problems thus created by the legislation in general.
- Chapter 4 will address the Financial Sector Conduct Authority's supervisory and enforcement role in terms of market abuse supervision and enforcement, wherein the practical issues experienced by the Financial Sector Conduct Authority in regulating insider trading due to the legislation or otherwise, will be addressed.

- Chapter 5 will comprise of a comparative study using foreign law. Foreign law that will be addressed is that of the Australia as this is arguably the country considered the most progressive at regulating insider trading in the world. This Chapter will also provide recommendations on whether or not the foreign law's regulations and mechanisms may indeed be adopted by South Africa to help better regulate insider trading in the country.
- Chapter 6 will ultimately answer the main research question, assess the research process and will include concluding remarks on the overall research.

CHAPTER 2
DEFINITIONAL ISSUES REGARDING INSIDER TRADING

2.1 INTRODUCTION

This chapter focuses on the actual definitions surrounding insider trading such as the definitions of an "insider" and "inside information". This chapter aims at dissecting these definitions and discussing how effective they are at describing each concept the definition relates to as well as discussing whether the definitions themselves are effective at contributing to the regulation of insider trading in the country.

2.2. DEALING

In the Financial Markets Act, dealing is defined as *"conveying or giving an instruction to deal",* however the word trading which is used in various defences against insider trading is still not defined. These two words are most likely to mean the same thing, however the lack of consistency in the words used may still cause some confusion.[27] Author suggests that the use of uniforms words (especially those actually defined in the Act) will cause less confusion and forced assumptions on what the word denotes.

2.3. INSIDE INFORMATION

Section 77[28] defines inside information as "specific or precise information which has not been made public and which is obtained or learned as an insider and which if it were made public, would be likely to have a material effect on the price or value of any security listed on the regulated market". Attention is therefore drawn to what constitutes specific and precise information. As the Act does not define the meaning of specific and precise information, the courts are required to determine this on a case by case basis. This is further emphasised by the JSE Limited booklet which provides

[27] Luiz and van der Linde *SA Merc LJ* 2013 464.
[28] Section 77 of the FMA.

that what may constitute specific and precise information in one situation may possibly not do so in another, depending on the surrounding circumstances.[29]

In *Zietsman v Directorate of Market Abuse*[30] the court inter alia deliberated on what constituted specific or precise information. The appellants argued that they were not aware at the time of trades in question that a loan had in fact been granted but that they only had limited, vague and unreliable information in respect of a possible future loan.[31] The alleged inside information was in summary therefore said to be in no way specific or precise as the securities dealings in fact occurred prior to the loan agreement having been finalised. It should be noted that the loan agreement was part of the alleged inside information in question and the courts therefore had to determine whether this indeed constituted inside information in terms of the definition.

Further argument by the appellants was that they were unaware and/or did not believe or know that the information they had indeed constituted inside information as required in terms of the insider trading definition.[32]

The court however decided that the event to which the information relates does not have to be in its final form for same to be considered specific and precise.[33] The Court consequently concluded that the information regarding the approval of the loan was both specific and precise[34] and that the information had not been made available to the public and was likewise price sensitive information.[35] The court added that disclosure of the information must be attributed to its precision and not to its chronological location in the process of an intermediate stage.[36] In terms of this case, emphasis is placed on the fact that the court had to rely on foreign law to assist in its

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[29] JSE Insider Trading and other Market Abuses (Including the Effective Management of Price Sensitive Information Booklet 2016 5.
[30] *Zietsman v Directorate of Market Abuse* 2016 1 SA 218 (GP). In this matter, although the charges were brought under the Securities Services Act (SSA), which has since been repealed, by the FMA as stated above, the judgement remains relevant as the definitions for inside information and the offence of insider trading are identical in both Acts.
[31] *Zietsman v Directorate of Market Abuse* 2016 1 SA 218 (GP) para 32(a).
[32] *Idem* para 30.
[33] *Idem* para 98.1.
[34] *Idem* para 99(b).
[35] *Idem* para 99(c).
[36] Morajane "What Constitutes Inside Information for Purposes of Insider Trading?: Zietsman v Directorate of Market Abuse 2016 1 SA 218 (GP)" 2017 *THRHR* 517.

interpretation of the provisions relating to inside information possibly due to the uncertainty presented to it by the Securities Services Act at the time.

One may likewise experience difficulty in establishing whether a person knows that they have inside information as was argued in the Zietsman case. It is argued that this may be established in matters of judgment as the insider must be aware of the specific and material nature of the information at the time the information was utilised to deal[37] thus requiring a subjective consideration in establishing one's liability. Consequently, Author therefore argues that it may be quite difficult for the prosecuting authorities especially, to prove beyond reasonable doubt that the accused was aware that he was in possession of inside information.

As the appellants in the Zietsman case alleged that they did not believe they had inside information, the court once again considered foreign law to assist with determining this definitional aspect. It was decided that a genuine bona fide belief that known information was not inside information, will not found a defence where such belief is not based on reasonable grounds.[38] It is submitted that the courts in the Zietsman case was correct in its approach of dismissing the appellant's defence as the defence itself carried no water and they had turned a blind eye to the warnings issued. This resulted in their belief not only being both disingenuous and mala fide but their belief that the information they possessed was not inside information was merely based on wishful thinking that the.[39]

Some authors in fact believe in an entirely different approach regarding the requirement of knowing one has insider information. Jooste[40] states that if the accused thinks (notwithstanding how unreasonable this belief may be) that the information is public and therefore does not constitute inside information, he does not commit the office. The application is therefore a subjective one whereas the approach taken in Zietsman was more objective and required reasonable grounds for the belief of the appellants to hold any weight.

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[37] Jooste 2004 *SALJ* 443.
[38] *Zietsman v Directorate of Market Abuse* 2016 1 SA 218 (GP) para 98.2.
[39] Morajane 2017 *THRHR* 522.
[40] Jooste 2004 *SALJ* 443.

Author argues that although the court's decision in the Zietsman case is indeed commendable, this was not guided by the provisions relating to insider trading themselves as their ambiguity, uncertainty and incompleteness instead contribute to difficulties in its interpretation and practical application to begin with. The court inter alia referred to the Australian case of Boughey v R [1986] HCA 29 to consider the degree to which the likelihood of an occurrence must be proved[41] to which the term "likely" was established to be a synonym for "probable". A lengthy consideration of foreign law from Europe and the United Kingdom was conducted by the courts to enable an accurate and well-respected decision to be reached.

One further interesting aspect learnt from the Zietsman case was the establishment that if one can prove that the transaction was not aimed at securing a benefit from the exposure to movement in the price of the security or a related security resulting from the inside information, this is indeed a valid defence.[42]

2.4. MATERIAL EFFECT ON THE PRICE OR VALUE OF LISTED SECURITIES

The Act does not define the term "material effect" or provide any guidance on instances where information would or could be considered to have a material effect on the price or value of listed securities.[43] This word has been regarded as a difficult concept that is "murky" and its use in legislation has been viewed as creating difficulties in legislative provisions which thus call for judicial intervention in attempts to unpack the difficulties created.[44]

Argument is also raised regarding the exclusion this requirement has created in terms of inside information that has a minor effect on the price value of the listed security. Inside information with a minor effect on the securities price would arguably fall outside of the definition and one would not be liable in terms of this prohibition. Due to this technicality that may be argued by an accused i.e. (that the use by the insider of the inside information did not have a material effect on the price or value of a listed

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[41] *Zietsman v Directorate of Market Abuse* 2016 1 SA 218 (GP) para 54.
[42] https://www.financialinstitutionslegalsnapshot.com/2015/10/the-inside-scoop-of-insider-trading-the-zietsman-judgment last visited on 7 August 2020.
[43] Morajane 2017 *THRHR* 519.
[44] *Idem* 520.

security), the Act should have in fact included a definition of a material effect to avoid unreasonable abuse.

2.5. PUBLICATION

Author argues that no open-ended list or even examples are provided in the Act of instances where certain information may be regarded as *prima facie* inside information. Instead, somewhat of a defence is provided to persons in terms of when information should in fact not be considered as inside information due to publication thereof.

Section 79 however, rather than attempting to mitigate and/or reduce the already existing confusion caused by the definition of inside information, proceeds to provide for instances where information does not constitute inside information due to its publication. An open-ended list of publicised information is then presented to include:

a. When the information is published in accordance with the rules of the relevant regulated market; or
b. When the information is contained in records which by virtue of any enactment are open to inspection by the public; or
c. When the information can be readily acquired by those likely to deal in any listed securities to which the information relates or of an issuer to which the information relates; or
d. When the information is derived from information that has been made public.[45]

The first instance in which information is considered to have been made public was created to ensure compliance with the general principles (iii) of the Listing Requirements[46] which require that full, equal and timeous public disclosure is made to all holders of securities and the general public at large regarding the activities of an insider that are price sensitive.[47]

[45] Section 79 of the FMA.
[46]Luiz and van der Linde 2013 *SA Merc LJ* 452.
[47] See Appendix 1 to Section 11 of the JSE Listing Requirements.

Information must be freely available and open for inspection and readily acquirable by any person without difficulty and without preferring certain investors to others to be regarded as having been made public.[48] If obtaining this information requires expertise and diligence in obtaining and accessing the said published information, then the information is not regarded as having been made public.[49]

It is thus noted that once price sensitive information has been made public, it is no longer regarded inside information, however the list is not exhaustive so it could be established in other ways that information has been made public. This once again contributes to the array of possible defensive by accused persons and required foreign law comparisons and interpretations to be taken on by our South African courts.

2.6 CONCLUSION

Indeed, though the Financial Markets Act came with a number of amendments that assisted with the definitional difficulties present in the Securities Services Act, it either still retained some of the same issues previously enacted by the Securities Services Act or created new ones. Terms such as “material effect”, “specific and precise” and “publication” contribute to the inconsistent enforcement of the insider trading provisions in the Financial Markets Act.[50]

The concept of insider trading is very poorly defined in the Financial Markets Act with the definitions of “insider” and “inside information” both cumbersome and counter-intuitive as they bounce off each other with no real clarity provided. For one to be an insider he or she has to have inside information and vice versa which cannot be considered to be of actual assistance in defining these terms. Additional terms such as “trading” and are not defined in the Act which leaves the courts with the duty to determine how these terms should be defined and how they would apply in practice.

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[48] Morajane 2017*THRHR* 518.

[49] Section 74(2) of the SSA was omitted in the enactment of the FMA. This stated that “inside information which would otherwise be regarded as having been made public must still be so regarded even though-

(a) It can be acquired only by persons exercising diligence or observation, or having expertise,
(b) It is committed only on payment of a fee; or
(c) It is only published outside the Republic”.

[50] Chitimira 2014 *PER/PERL* 966.

Foreign law has therefore had to be relied on as a guide to adequately assist courts with these definitions as the Act's definitions and/or lack thereof have proven vague and inadequate.

CHAPTER 3
AN ANALYSIS OF INSIDER TRADING REGULATIONS IN SOUTH AFRICA

3.1. INTRODUCTION

Insider Trading is primarily governed by the Financial Markets Act (hereinafter interchangeably referred to as the Financial Markets Act and/or the Act).[51] Different instances are catered for in terms of the Act, in which one would be found guilty of the offence of insider trading. This chapter is aimed at addressing the prohibitions against insider trading in terms of the Act as well as the available defences thereof. This chapter will then proceed to analyse each provision in attempts to identify the downfalls thereof that ultimately hinder the effective surveillance, regulation and enforcement of insider trading in South Africa. Subsequently, this chapter will then discuss various additional flaws in terms of the insider trading regulation as a whole and will include possible mechanisms or provisions that could be considered by policy makers to assist in better regulating insider trading.

3.2. DEALING FOR ONE'S OWN ACCOUNT

Section 78(1)(a)[52] provides for instances where the insider trading occurs through an insider dealing directly or indirectly or through an agent for his own account. The adequacy of this provision is in itself blemished by the lack of a clear and precise definition for the term "through an agent". This could therefore allow for persons to circumvent this specific insider trading prohibition through or by using other persons who are not necessarily considered agents.[53]

(a) A defence for this particular offence is then provided for in the Act which states that one would not be found guilty of having committed insider trading

[51] Financial Markets Act 19 of 2012.
[52] Section 78(1)(a) of the FMA.
[53] Chitimira "*A comparative synopsis of the statutory prohibition of insider trading in Namibia and South Africa*" 2019 Volume 9 Issue 2 502.

for his own account if he only became an insider after he or she had given the instruction to deal to an authorised user and the instruction was not changed after he or she became an insider.[54] The rationale behind this defence is if a person gives instruction to an authorised user to deal and that person subsequently acquires inside information, that person should not be found guilty of an offence as long as that person does not change his instructions following receipt of that information. The information therefore did not prompt the person's decision to deal as he or she would have still proceeded to deal in the same manner devoid of the inside information.[55] It may be unclear who exactly could be regarded as an agent for the purposes of the prohibition itself in terms of the Financial Markets Act and this would therefore have to be determined in accordance with the relevant general practices of law.[56]

Certainty may be blurry in terms of whether this defence indeed covers instances in which the instructions were given by agents or others as the provision implies that the instruction to deal must be given directly to the authorised user.[57] Nevertheless, despite the slight confusion that may be created is it is safe to assume that it caters for instances where the instructions were given by agents or others due to the overarching definition of insider trading.

(b) The second defence in terms of section 78(1)(b)(ii) provides for a defence for an insider dealing for his own account in that one is likewise not guilty of any offence relating to insider trading if he or she can prove on a balance of probabilities that he was acting in pursuit of a transaction in respect of which all the parties to the transaction were in possession of the same information;[58] the trading was limited to parties having the same information[59] and the transaction was not aimed at securing a benefit from

[54] Section 78(1)(b)(i) of the FMA.
[55] Jooste 2004 *SALJ* 446.
[56] Chitimira "*Unpacking selected key elements of the insider trading and market manipulation offences in South Africa*" 2016 2 JCCL&P 32.
[57] Luiz and van der Linde 2013 *SA Merc LJ* 463.
[58] Section 78(1)(b)(i) of the FMA.
[59] Section 78(1)(b)(ii) of the FMA.

exposure to movement in the price of the security, or related security resulting from the inside information.[60] It would appear that all the listed elements of the defence would have to be present for the defence to apply to an accused.

It is unclear how all these elements would be proven in the context of a regular trader on the exchange where the matching of buying and selling orders is processed through a centralised system. Even if the parties buy and sell the exact same number of listed securities on the same day there would be no way of ensuring that these orders are matched.[61] It is argued that this defence would prove more effective for the dealing of securities done off-market, however as the definition of insider trading is specific to listed securities on a regulated market, this argument in its attempts to rationalise the defence, is irrelevant in this context.

3.3. DEALING FOR A THIRD PARTY

The defences applicable to an insider dealing for his own account are more or less similar to one dealing on behalf of someone else save for the addition of a few defences. In this instance an insider will not be found guilty of an offence relating to insider trading if such insider proves on balance of probabilities that he is an authorised user and was acting on specific instructions from a client and did not know that the client was an insider at the time.[62] In this regard institutions that have been named market makers in the bond market by the South African Reserve Bank may not be deemed as carrying on insider trading if they are acting on specific instructions from the central bank to deal in bonds.[63]

This defence therefore requires the authorised user to show that he did not know that the client was an insider at the time. It is argued that the time

[60] Section 78(1)(b)(iii) of the FMA.
[61] Luiz and van der Linde 2013 *SA Merc LJ* 465.
[62] Section 78(2)(a)(i) of the FMA.
[63] See Insider Trading and other market Abuses (including the Effective Management of Price Sensitive information) JSE Booklet November 2006 18.

specifically referred to is that time at which the authorised person acted on the instruction and not when the instruction was given to him.[64] A more onerous aspect added to the defence is that it may not only be enough to know that one is an insider but one would also have to be aware that the insider has inside information, which inside information prompted the instructions given to the authorised user. The likely hood of being able to prove these elements may be slim. Consequently, the defence in itself could stand by means of a bear denial of the alleged facts by the accused as the prosecutor may be unable to prove the contrary in terms of the required elements.

Similar to section 78(2)(a)(i), section 78(2)(b)(ii) provides for a defence where the person only became an insider after having given the instruction to an authorised user. Common misconception may relate to who must not be an insider at the time the instruction is given to deal. It is therefore important to note that the insider who deals on behalf of someone else must prove that he, rather than the person on whose behalf he dealt, only became an inside at a later stage.[65] The legislature should have perhaps worded the provision differently for clarity's sake.

3.4. UNLAWFUL DISCLOSURE OF INSIDER INFORMATION

An insider who knows that he has inside information and proceeds to disclose the inside information to a third party has committed an offence in terms of the insider trading prohibitions of the Financial Markets Act.[66] The provisions of Section 78(4)(b) seem straight forward, however from the use of the terms "he" or "she" it does not appear to prohibit the unlawful disclosure of non-public price-sensitive inside information that relates to juristic persons by their agents who are insiders as defined under the Act.[67] Consequently, notwithstanding the fact that juristic persons are capable of disclosing price sensitive inside information through its agents they are not expressly covered this provision.

[64] Luiz and van der Linde 2013 *SA Merc LJ* 446.
[65] *Ibid* 446
[66] Section 78(4)(a) of the FMA.
[67] Chitimira 2016 JCCL&P 34.

Possible prohibited disclosures of price sensitive information that relates to listed securities by juristic persons may therefore be used as means to commit the offence yet evade the liability that should be incurred.

In terms of the Act itself, one may however escape such liability if he can prove on a balance of probabilities that such information was disclosed because it was not only necessary to do so however such disclosure was also for purposes of the proper performance of his functions in his employment, office or profession in circumstances that were unrelated to the dealing in securities listed on the regulated market and that he, at the time the information was disclosed; did in fact advise that it was inside information.[68] The absence of a definition for the term "proper performance" may arguably lead to an abuse of this defence by some insiders either unwittingly or intentionally.[69]

3.5. A BALANCE OF PROBABILITIES

It is interesting to note that in terms of the defences available to an accused, he or she is only required to prove their defence on balance of probabilities whilst the prosecution would be forced to prove the offence beyond reasonable doubt. Author is uncertain as to the legislature's intent behind this and further argues that the imbalanced burden of proof possibly makes the evasion of the offence easier than the actual prosecution thereof. Nevertheless, the high evidentiary proof required in criminal proceedings in itself could be contributing to the low success rate in prosecuting insider trading offences.

3.6. REGULATORY CONSTRAINTS OF REGULATING INSIDER TRADING

The prohibition against insider trading in general is unfortunately only limited to securities listed on a regulated market. It therefore follows that other trading activities that are conducted by insiders or other persons directly, indirectly or through an agent for their own account or on behalf of a third party, in securities that are not listed on a

[68] Section 78(4)(b) of the FMA.
[69] Chitimira 2019 510.

regulated market are not cover nor prohibited in terms of the Financial Markets Act.[70] An insider can therefore be aware that they have price sensitive inside information at the time they deal and still proceed to deal in non-listed securities such as over the counter derivatives and multilateral trading facilities to which the inside information relates and nevertheless evade liability due to the technicality of the security not being a listed security on the regulated market. Well known argued reasons for the regulation of insider trading are inter alia, the protection of investors, ensuring that markets are fair, efficient and transparent and the reduction of systematic risk.[71] These same considerations should therefore be had in relation to unlisted securities in a non-regulated market as the same risks being mitigated in listed securities could occur in the unlisted and non-regulated securities environment.

An additional flaw to the effectiveness of the regulation is that although the Financial Sector Conduct Authority is empowered to regulate insider trading, the prosecution function is mainly vested in the Directorate of Public Prosecutions.[72] In light of the backlogs in the criminal courts which in turn thus delay criminal prosecutions for insider trading thereof, prosecutions of insider trading end up happening quite slow and are long-winded. In light of the backlogs in our criminal courts, Chitimira suggests that the legislature and/or policy makers should consider the establishment of specialised market abuse courts or tribunals to complement the enforcement efforts of the FSCA and to enhance the criminal prosecution of market abuse cases in the country.[73]

Flowing from the above mentioned point, it is further put forward that the current sanctioned criminal penalties for insider trading could be considered low and insufficient at discouraging perpetrators from committing the actual defence, due to the fact that offenders could make large profits from the offence and thus be able to afford to pay the prescribed fine and/or go to jail without necessarily forfeiting their illicitly gained profits.[74] As no robust criminal penalties are provided for against insider trading offences, it should therefore be considered if the ‘reward’ may indeed ultimately outweigh the possible penalty that may be faced by a perpetrator.

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[70] Chitimira 2019 502.
[71] Luiz and van der Linde 2013 *SA Merc LJ* 458.
[72] Chitimira 2014 *PER/PERL* 962.
[73] *Idem* 966.
[74] Chitimira 2019 506.

Wherefore it is further added that what could be contributing to the unsuccessful prosecutions and convictions of insider trading in South Africa is the high evidentiary burden of proof which is intensified by the absence of separate and distinct insider trading penalties for individuals and/or juristic persons that are found guilty of insider trading offences. The Financial Markets Act not only fails to provide separate and distinct insider trading penalties for individuals and juristic person but also for persons found guilty for dealing for their own account, dealing for a third party and those who merely discourage or encourage others from dealing in the affected listed security while armed with price sensitive inside information.[75]

Chitimira states that as there is no express authority statutorily conferred on the Johannesburg Stock Exchange (JSE) to adjudicate and prosecute market manipulation and insider trading cases this contributes to the regulatory framework's ineffectiveness at regulating the said prohibitions.[76] He adds that in light of this flaw, policy makers ought to consider introducing a specific provision into the Financial Markets Act that obliges and empowers the Johannesburg Stock Exchange's Surveillance Division to prosecute or report incidents of market abuse and insider trading to the Financial Sector Conduct Authority.

The Provisions relating to insider trading in the Act fail to expressly prohibit other insider trading practices such as attempted insider trading. It is put forward that attempted insider trading should be considered by the legislature to include tipping, inducing or encouraging another person to deal as well as an attempt to deal or discouraging or attempting to discourage another person from dealing in any or certain securities or financial instruments traded on regulated markets.[77] As the legislation currently stands, one would only be able to prosecute an insider for encouraging or causing one to deal or discouraging or stopping another person from dealing in the securities listed on a regulated market to which the inside information he indeed has relates or which is likely affected by it.[78]

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[75] Chitimira 2019 507.
[76] Chitimira 2014 *PER/PERL* 964.
[77] Chitimira 2016 JCCL&P 35.
[78] Section 78(5) of the FMA.

In any other circumstance, should the insider only attempt to deal for his own account using inside information he knows he has or attempt to deal on behalf of another person using inside information he knows he has or attempt to disclose inside information to another person for the purposes of dealing in listed securities in terms of which the inside information relates, but fails, the offender may merely evade prosecution due to the legislature's failure to make provision for the offence.

It may indeed be argued that no offence was actually committed, however such argument holds no wait in light of the Criminal Procedure Act[79] which ordinarily makes provision for the attempted commission of a crime that may be unsuccessful for whatever reason as the intent to commit the prohibited act remains.

It is further noted that the Financial Markets Act does not expressly provide for any insider trading alternative resolutory mechanisms such as arbitration and alternative dispute resolution, whistle blowing, bounty rewards, private rights of action and the establishment of self-regulatory organs.[80] This could perhaps aid in the combating of insider trading practices as not only criminal sanctions are available to persons, which as stated above; has its own flaws as it stands. Perhaps addition of this methods into the current legislation by policy holders should be considered to aid with the current arguably single sighted methods available to penalise or regulate insider trading in South Africa.

3.7. CONCLUSION

The Financial Markets Act as the main regulatory framework used to govern insider trading contains various definitional shortcomings, gaps and ambiguity. It provides for a number of defences one can put forward as an accused against the charge of insider trading whilst in itself failing to clarify certain concepts therein. It not only fails to clarify a number of concepts, however also comes short in the scope of regulation in that it

[79] Criminal Procedure Act 51 of 1977. See s 153 (3)(c) "In criminal proceedings relating to a charge that accused committed or attempted to commit extortion or any statutory offence of demanding from any other person some advantage which was not due and, by inspiring fear in the mind of such other person, compelling him to render such advantage, the court before which such proceedings are pending may, at the request of such other person, direct that any person whose presence is not necessary at the proceedings, shall not be present at the proceedings…".
[80] Chitimira 2014 *PER/PERL* 965.

fails to make provision for the regulation of insider trading in relation to non-listed securities and/or securities on a non-regulated market. The criminal courts and the FSCA as the enforcement bodies mandated to penalise and enforce insider trading activities require a number of aids to enhance their effectiveness such as specific insider trading courts or tribunals as well as the addition of arbitration and alternative dispute mechanisms. Though the Financial Markets Act was enacted in attempts to combat the initial shortcomings of its predecessor (the Securities Services Act)[81], the Financial Markets Act still requires a number of improvements in terms of its insider trading provisions if it aims at actually achieving its purpose.

[81] Securities Services Act 36 of 2004.

CHAPTER 4
THE REGULATOR'S ROLE AND ENFORCEMENT DIFFICULTIES

4.1 INTRODUCTION

In addition to potential criminal liability for the contravention of the insider trading provisions, Section 84 of the Financial Markets Act authorises the Financial Sector Conduct Authority (hereinafter referred to as the FSCA)[82] to bring an action against an insider who had contravened the insider trading provisions in section 78[83] in order to claim the profit made or loss avoided, a penalty (for compensatory or punitive purposes), interest and costs. These provisions initially enacted in section 6 of the Insider Trading Act,[84] then section 77 of the Securities Services Act[85] and eventually section 84 of the Financial Markets Act; were hailed as setting international precedent in that South Africa became the first country to allow for compensation of investors through a statutory class action initiated by the regulator.[86] Though this may be seen as a huge achievement and step in the right direction in deterring, monitoring and punishing insider trading practices, this chapter sets out to discuss the effectiveness of the FSCA's supervision and insuring insider's compliance with the insider trading provisions. This chapter then sets out to determine the difficulties experience by the FSCA in carrying out its mandate in terms of section 84 of the Act as well as address what possible aids could be implemented to better assist the FSCA at increasing its effectiveness as required in terms of the Act.

4.2 THE FSCA'S DIRECTIVE

4.2.1 DUTIES OF THE FSCA

In terms of section 84 of the Act, it is stated that the FSCA is responsible for the supervision of compliance with market abuse provisions. In general however, the FSCA's role is to protect the integrity of the South African financial markets

[82] Previously called the Financial Services Board incorporated in terms of the Financial Services Board Act No. 97 of 1990 now called the Financial Sector Conduct Authority incorporated in terms of the Financial Sector Regulation Act 9 of 2017 (hereinafter referred to as the FSR Act).
[83] Section 78 of the FMA.
[84] Insider Trading Act 135 of 1998.
[85] Securities Services Act 36 of 2004.
[86] Luiz and van der Linde 2013 *SA Merc LJ* 470

whilst in turn protecting members of the public and upholding the investment community for securities traded and listed on a regulated market. Additionally, in terms of the Financial Sector Regulation Act the FSCA's role is to inter alia, provide support to the efficiency and integrity of financial markets, assist in maintaining financial stability and support financial inclusion and transformation of the financial sector.[87]

4.3. POWERS OF THE FSCA.

In particular, section 84(2) states that- In addition to its powers in terms of the Financial Markets Act, the board may subject to section 85-

(a) investigate any matter relating to an offence or contravention referred to in section 78, 80 and 81, including insider trading in terms of the Insider Act, 1998 (Act No. 135 of 1998), and the offences referred to in Chapter VIII of the Securities Services Act, 2004 (Act No. 36 of 2004), committed before the repeal of those Acts
(b) at the request of the supervisory authority, investigate or assist the supervisor authority in an investigation into possible offences similar to those referred to in paragraph (a), regulated in terms of the laws of a country other than the Republic that the supervisory authority administers;
(c) institute such proceedings as are contemplated in the Chapter
(d) administer the proof of claims and distribution of payments in terms of section 82;
(e) by notice on the official website or by means of any other appropriate public media make known the status of an investigation and the details of an investigation if same is in the public interest.

It should be noted that the Financial Markets Act no longer allows the FSCA to bring a civil action against a person who has contravened the insider trading provisions and section 82 of the Act now only allows for the imposition and payment of an administrative sanction not exceeding the regulated amounts contemplated in terms of sections 82(1) and 82(2) of the Act.[88]

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[87]Section 57 of the FSR Act.

[88] Section 82(1) of the FMA states that "Subject to subsection (3), any person who contravenes section 78(1), (2) or (3) of this Act is liable to pay an administrative sanction not exceeding-

(a) The equivalent of the profit that the person, such other person or such insider, as the case may be, made or would have made if he or she had sold the securities at any stage, or the loss avoided through such dealing;
(b) An amount of up to R1million, to be adjusted by the register annually to reflect the Consumer Price Index, as published by Statistics South Africa, plus three times the amount referred to in paragraph (a)
(c) Interest; and
(d) Cost of suit, including investigation costs, on such scale as determined by the Enforcement Committee.

Section 82(2) provides for similar calculation of the administrative fine in terms of section 82(b), (c) and (d) for a person who contravene section 78(4) or (5) of the Act however deviates slightly in terms of section 82(1) in that the amount will be equivalent of the profit that such person made or would have made if he sold the securities at any stage, or the loss avoided through such dealing, if the recipient of the information, or such other person, as the case may be, dealt directly or indirectly

Section 85(1)(c)(i) however states that the Directorate of Market Abuse exercises the power of the FSCA to institute any civil proceedings contemplated in the chapter which therefore entails that the Directorate of Market Abuse may institute proceedings stipulated in section 84(2)(c) in the name of the FSCA.[89]

4.4. RATE OF SUCCESS IN PROSECUTING OR SETTLING INSIDER TRADING CASES

The data concerning insider trading shows that although this has been offence in existence since 1973, the National Prosecuting Authority is yet to attain a conviction for its violation.[90] It should also be noted that high incidences of market abuse case are reported which however are ultimately not subjected to the enforcement process at all.[91] Put differently, in terms of an analysis of the FSCA's publicly available annual reports a summary of the statistics shows that as far back as 1999 to 2013, a total of 40 (forty) cases of market abuse (thus not only limited to insider trading) have been referred to the FSCA's Enforcement Committee. Of those cases however, 17 (seventeen) were resolved through settlement and the remaining 23 (twenty three) through the administrative process.[92] To date therefore, no insider trading case has been prosecuted before the South African courts and no precedent exists in this regard.

In terms of the then Financial Services Board's 2013 annual reports however[93], it was reported that the FSCA (FSBA at the time) registered a total of 12 (twelve) market abuse new cases (eight insider trading and, two market

in the securities listed on a regulated market to which the inside information relates or which are likely to be affected by it.
Section 82(2)(e) adds that the administrative sanction paid may include the commission or consideration received for such disclosure, encouragement or discouragement.

[89] Luiz and van der Linde 2013 *SA Merc LJ* 471

[90] Kawadza "*Extra-Judicial Enforcement of Securities Regulation and the Public Interest Theory: South African Perspective*" 2015 29 Speculum Juris Part 1 56.

[91] *Idem* 54.

[92] Kawadza 2015 *Speculum Juris* 54. See in particular FSB "Annual Report 2008".

[93] FSB Annual reports 2010: www.fsca.co.za/Pages/Annual-Reports.aspx) last accessed 26 September 2020.

manipulation and three false reporting cases) for investigation bringing the total number of cases registered since inception to 317 (three hundred and seventeen). These were however incidents that warranted investigation, but were not necessarily found to constitute market abuse contraventions. The annual report goes further to state that during the year under review the Directorate of Market Abuse held meetings to consider 17 (seventeen) completed investigations. Of those seventeen cases, eleven were closed once it became evident that no or insufficient evidence had been obtained to warrant action in terms of the anti-market abuse provisions.

Although the Director of Public Prosecution has continued with its prosecuting role on all matters involving insider trading in South Africa, very few insider trading cases were successfully and timeously settled and/or prosecuted by the relevant enforcement authorities under the Securities Services Act.[94]

4.5. BRIEF DESCRIPTION OF THE PROCESS

The FSCA in essence carries out the mandate of the Directorate of Market Abuse which is a committee appointed by the Minister of Finance to investigate and enforce market abuse contraventions.

If a contravention of the Financial Markets Act is detected, the Directorate of Market Abuse may either refer the matter to the National Prosecuting Authority for criminal prosecution, apply to court for an interdict or attachment order in terms of section 83[95] or refer the matter to the FSCA's Enforcement Committee for enforcement action to be instituted against the offender.[96]

If after an investigation of a possible contravention of section 78 of the Act, the Directorate of Market Abuse then refers same to the Enforcement Committee, the recommendation ought to be accompanied by a notice detailing the alleged contravention, the recommended administrative sanction and an affidavit which

[94] Chitimira 2019 499.
[95] Section 83 of the FMA.
[96] Section 99 of the FMA.

sets out the facts of the matter together with supporting documents. During this process, the alleged contravener is provided with a copy of the documents submitted to the Enforcement Committee as well as an opportunity to respond to the allegations brought against him.[97] It is then when opportunity is given to the parties to reach a settlement, failing which the matter will be heard by the Enforcement Committee to determine whether the person has indeed contravened the provisions of section 78.

An insider trader may incur administrative penalties and may be liable to pay a fine not exceeding R50 million.

Should insider trading be detected by the Johannesburg Stock Exchange ("JSE"), the JSE would refer the matter to the FSCA in which referral their observations would be discussed and the FSCA can then decide whether or not to institute an investigation. Following the investigation, the FSCA may either peruse action in terms of section 6 of the Financial Institutions Act 28 of 2001 as amended by section 42 and 43 of the Financial Services Laws General Amendment Act 2008 or refer the matter to the Directorate of Market Abuse Committee where the above process will then commence.

The coming to effect of the Financial Sector Regulation Act introduced the Financial Sector Tribunal which replaces the former Financial Services Appeal Board.[98] This tribunal was established to deal with appeals from persons who are aggrieved by an FSCA decision.

4.6. DIFFICULTIES EXPERIENCED BY THE FSCA

It could be argued that allowing room for possible settlements by the parties aids in the failure to deter one from the actual contravention of the prohibited act itself to begin with. One may consider that even if their contravention is investigated and evidence thus complied against him by the Directorate of

[97] Section 6B1(a) of the Financial Institutions Act 28 of 2001.
[98] Section 219 of the FSR Act.

Market Abuse, the room for settlement and avoidance of the Enforcement Committee's administrative sanction or prosecution makes the insider trading and profits made or loss avoided worth committing the prohibited act. Despite the existence of a criminal sanction with stiffer penalties therefore, that option has not been fully exploited as the bulk of disciplinary actions are settled rather than fully litigated.[99]

It is however also argued that the benefits of settling exceed the aforementioned downfall in that although the matter is not fully litigated, perpetrators are still punished in having to part with their hard-earned money even if same was ill-gotten. The FSCA's enforcement endeavours are hampered by a limitation of resources and thus settlements help with saving costs and speedy resolutions of the matter rather than having to endure excessive litigious costs or lengthy court trials.

As there is hardly any judicial involvement in the enforcement process there is barely any precedent relating to insider trading offences and thus no adequate judicial guidance on how to adequately deal with a potential conviction of the contravention. The courts themselves are yet to develop a coherent, decisive doctrine governing market abuse in general.[100] Adjudication over settlement discharges the creation of precedent and thus avoids the necessity of revisiting the application and interpretation of every law concerned. Settlements are additionally made on a "without admitting or denying lability basis" which enables the FSCA to attempt deterring persons from committing insider trading due to the settlement amount that will be paid by the perpetrator and also enables it to do so devoid of support from the courts and precedent it could rely on for guidance and certainty.

Though some scholars argue that the main purpose for insider trading sanctions should be to punish the wrong doer and create an enforcement culture that embraces public interest considerations, in terms of the case of

[99] Kawadza 2015 *Speculum Juris* 56.
[100] *Idem* 58.

the Financial Services Board v Berman & Stacey,[101] commentary of the case summarised that the Appeal Board held that deterrence should be considered in every case and also added that the element of proportionality always requires that the circumstances of the contravention and those of the offender be taken into account when making an decision.[102] The FSCA is therefore forced to balance the elements of deterrence, personal circumstances of the offender and the proportionality of the contravention itself when making a determination rather than merely imposing a blanket punishment on the offender. These elements may thus add to the difficulty in adequately sanctioning an offence for insider trading in that such dilemmas and considerations are not necessarily a factor in criminal and general enforcement cases.

It should once again be kept in mind that the FSCA does not have its own adequate surveillance systems to detect and curb insider trading activities in South Africa. The FSCA therefore strongly relies on the JSE's surveillance department and this at times leads to delays in the investigation, settlements and prosecution of insider trading cases.[103]

It should be noted that the FSCA will only prosecute cases of insider trading if the Director of Public Prosecution declines to prosecute such cases. This further entails that the FSCA in fact has limited and restricted prosecutorial authority in respect of insider trading cases under the Act. No such prosecutorial authority is given to the FSCA at all in terms of the Financial Sector Regulation Act.[104] Even if the FSCA therefore intended to fully prosecute insider trading contraventions, the restriction of their prosecutorial authority almost ties their hands up thus limiting them to enforcing and penalising insider trading through administrative sanctions and settlements with the parties.

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[101] Financial Services Board v Michael Berman & Neil Stacey 2007.
[102] https://www.bowamnslaw.com/insights/finance/administrative-penalties-a-deterrent-to-market-abuse/ last visited on 25 September 2020.
[103] Chitimira 2019 499.
[104] Chitimira 2019 506.

The ambiguity of the wording and application of the legislation contributes to uncertainty on how to apply some of the provisions and leads to the possible undermining of the Regulator in attempts to fulfil its role. In terms of the case of *Pather v Financial Services Board,*[105] the appellants applied for an order declaring that the Enforcement Committee had no jurisdiction to make the decision that the appellants contravened market abuse prohibitions by operation of section 79 of the Securities Services Act, alternatively by operation of the doctrine of ultra vires.[106] In this case specifically the alleged market abuse was the publishing of false statements that resulted in an overstatement of the performance of their company.

The two appellants (Maslamony and Pather) did not contend that the factual findings of the Enforcement Committee were incorrect or wrong but rather that a hearing by the Enforcement Committee on charges of market abuse (such as insider trading) that results in the imposition of an administrative penalty is similar to a criminal prosecution and thus the standard of proof should be beyond reasonable doubt and not the civil standard of a balance of probabilities.[107] They therefore applied for an order to review or set aside the decision that the appellants contravened section 76 of the Securities Services Act for the reason that the Enforcement Committee applied the incorrect standard of proof.[108] This argument was however dismissed at the Supreme Court of Appeal (SCA).

The Supreme Court of Appeal confirmed that the purpose of the Securities Services Act was to protect the public and promote confidence in the market. The fact that the Enforcement Committee may impose administrative penalties does not make proceedings before it criminal in nature. In fact, an administrative penalty if not paid; may be converted into a civil judgment in favour of the FSCA. It was further added that an administrative penalty does not constitute a previous conviction and therefore cannot be categorised as

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[105] *Pather and Another v Financial Services Board and Others* [2017] 4 All SA 666 (SCA).
[106] *Pather and Another v Financial Services Board and Others* [2017] para 4.1.
[107] www.mondaq.com/southafrica/white-collar-crime-anti-corruption-fraud/636146/fsb-victory-in-market abuse-case last visited on 26 September 2020.
[108] *Pather and Another v Financial Services Board* [2017] para 4.3.

the same or in the same genome as criminal proceedings also due to the fact that Enforcement Committee proceedings are not a risk of imprisonment or the deprivation of one's liberty.[109]

The above analysis by the courts was adopted through the court's consultation with foreign law and consistency with the approach adopted with regards to administrative penalties that are imposed under the Companies Act 71 of 2008, Income Tax Act 58 of 1962 and the Employment Equity Act 55 of 1998. The court further added that the fact that a penalty is intended to have a deterrent effect does not mean it is not administrative in nature because deterrence may serve civil as well as criminal goals.[110]

The result of the decision is that a person who is aggrieved by the outcome of proceedings before the Enforcement Committee can only review the decision on grounds of unlawfulness, procedural unfairness or unreasonableness.[111] This decision no doubt pleased the FSCA as it provided much needed certainty on the nature of the proceedings before the Enforcement Committee and brought an end to the repetitive jurisdictional questions and points raised by aggrieved persons that had to be entrained by both the courts and the FSCA itself until resolved and precedent thus set for such matters going forward.

4.7 CONCLUSION

The FSCA in attempts to discharge of its duties to supervise and provide enforcement against contraventions of the insider trading provisions have been unsuccessful at successfully prosecuting offenders for insider trading offences. This is proven by the statistics provided by the FSCA itself in terms of its annual reports. The FSCA is however hindered by various obstacles such as the lack of provision given to them for their own surveillance systems, vague and incomplete regulatory provisions, the lack

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[109] *Idem* para 32.
[110] Pather and Another v Financial Services Board and Others [2017] paragraph 34.
[111] www.mondaq.com/southafrica/white-collar-crime-anti-corruption-fraud/636146/fsb-victory-in-market-abuse-case last visited on 26 September 2020.

of judicial precedents as guide on how to deal with matters before it and the need to balance both deterrence and person's circumstances when handing down an administrative judgement. Once the FSCA's function is encumbered, this places a burden on the entire market abuse sanction as a whole and indeed contributes to the ineffectiveness of regulating the prohibition of insider trading in South Africa.

CHAPTER 5
COMPARATIVE OVERVIEW

5.1 INTRODUCTION

In terms of Insider trading law in South Africa, it is common practice to refer to foreign law as a guide for interpretative and application purposes. The Constitution of the Republic of South Africa encourages the consideration of foreign law when interpreting legislation and in fact makes it compulsory that international law must be considered when interpreting the Bill of Rights.[112] This chapter seeks to analyse foreign law provisions and mechanisms in Australia pertaining to market abuse (more specifically insider trading provisions) in attempts to establish how this country has arguably become acknowledged to have the most progressive and developed market abuse legislation in the world.[113] This is to assess how to better regulate the prohibition of insider trading in South Africa and to ascertain which of these mechanism and provisions can be adopted by South Africa to aid with more successful prosecutions and enforcement matters against offenders by the FSCA in particular.

5.2 INSIDER TRADING IN AUSTRALIA VS SOUTH AFRICA

Insider trading in Australia is regulated by means of the Corporations Act, 2001 (the Corporations Act). The elements of insider trading can be found in sections 1043A and 1042A of the corporations Act. Section 1043A (1) specifically provides that,

"subject to this subdivision if:

(a) a person possesses inside information and
(b) the insider knows, or ought reasonably to know that the matters specified in paragraph (a) and (b) of the definition of inside information in section 1042A are satisfied in relation to the information, the insider must not (whether as principal or agent)
(c) apply for, acquire or dispose of relevant division 3 financial products, or enter into an agreement to apply for, acquire or dispose of relevant division 3 financial products; or
(d) procure another person to apply for, acquire or dispose of relevant division 3 financial products, or enter into an agreement to apply for, acquire or dispose of relevant division 3 financial products and failure to comply with this subsection is an offence".[114]

[112] Section 39(1)(b)(c) of the Constitution of the Republic of South Africa, 1996.
[113] Chitimira 2015 *Speculum Juris* 86.
[114] See s 1043A(1) of the Corporations Act, 2001 for full provisions.

Section 1043A(2) makes provision for the communication of inside information or the causing of inside information to be communicated to another person if the insider knows, or ought reasonably to know that the other person would or would be likely to apply for, acquire or dispose of division 3 products or procure another person to apply for, acquire or dispose of relevant division 3 financial products.[115]

In terms of Section 1042A inside information is defined as "information which is not generally available and if the information were generally available, a reasonable person would expect it to have a material effect on the price or value of financial products". In this regard concepts such as "generally available" and "material effect" are expressly defined in the Corporations Act to aid with a complete definition leaving little room form ambiguity in terms of the offence. Wherefore material effect is then defined as "in relation to a reasonable person's expectations of the effect of information on the price or value of particular division 3 financial products". "Information" on its own is defined as including matters of supposition and other matters that are insufficiently definite to warrant being made known to the public and matters relating to the intentions or likely intentions of a person.[116] The definition is not exhaustive and leaves much scope for interpretation as to what may amount to information, however various cases have demonstrated that information may come in any form such as:

(a) factual knowledge of a concrete kind or that obtained by means of a hint or veiled suggestion from which one can impute their knowledge; and
(b) a rumour that something has happened with respect to a company which a person neither believes nor disbelieves.[117]

The manner in which this information exists is not important as this has no bearing on its status as information as long as there is sufficient substance for the information to have the potential to be price sensitive[118] and thus constitute inside information if compliant with the complete definition thereof.

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[115] Section 1043A(2) of the Corporations Act.
[116] See s 1042A of the Corporations Act.
[117] Overland "*There was Movement at the Station for the word had passed around: How does a company possess Inside Information under Australian Insider Trading Laws?"* 2006 MqJBL Vol 3 244.
[118] *Ibid* 244.

As previously stated in this research, the lack of a definition for material effect in the Financial Markets Act may open up the provision to obscurity and abuse. Even definitions that make use of the reasonable man objective test at least serve as an aid at better applying the legislation and may repel all mundane defences utilised against the defence merely entertainable due to ambiguity or incompleteness of the provisions. An open-ended list of information, though not inside information is provided in the Corporations as guide which is lacking in the Financial Markets Act. In general, the Financial Markets Act could adopt the inclusion of examples, guides, open ended lists and meanings of concepts used in their definitions as is the case with the Corporations Act to avoid such legislative lacuna.

5.3 THE CHINESE WALL

The Chinese wall is a concept that was derived from scenarios where for example the corporate advisory department of a company has inside information relating to shares in another company and the investment department of the company, which does not have inside information deals in the shares. In this scenario one should therefore consider whether or not the company can be said to have dealt on the strength of that inside information. As previously stated in Chapter 1 the definition of an insider is no longer limited to individuals but rather a “person”.[119] As such, a juristic person i.e. a company may indeed be found guilty of committing the offence of insider trading. That is however, unless the defence of a Chinese wall is made available to the company.

In essence a Chinese wall is a technique used to prevent insider trading and to manage conflict of interests which may arise when financial business is carried on by a multi-functioning organisation.[120] A physical and operational segregation of functions is therefore created to prevent information from flowing from one department to another thus avoiding liability for insider trading merely due to some employees having inside information which the investment department for example may not be privy to.[121]

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[119] See s 77 of the FMA.
[120] Cassim 2007 *SA Merc LJ* 46.
[121] *Ibid* 46.

In terms of Australian law corporate entities may also be held liable for the contravention of insider trading laws however, the act also expressly provides for a Chinese Wall defence in terms of section 1043F of the Corporations Act as a necessary accompaniment to the possibility of corporate liability for insider trading. In terms of the said provision:

"A body corporate does not contravene section 1043A(1) by entering into a transaction or agreement at any time merely because of information in the possession of an officer or employee of the body corporate if:

(a) the decision to enter into the transaction or agreement was taken on its behalf by a person or persons other than that officer or employee; and
(b) it had in operation at the time arrangements that could reasonably be expected to ensure that the information was not communicated to the person or persons who made the decision and that no advice with respect to the transaction or agreement was given to that person or any of those persons by a person in possession of the information; and
(c) the information was not communicated and no such advice was given".

In terms of the wording of the provision, it would appear that all three elements need to be proven to be successful with the Chinese wall defence.

Though the Securities Services Act and now the Financial Markets Act was progressive enough to include juristic persons as possible offenders of insider trading provisions thus not only limiting the contravention to individuals, it failed to consider instances such as those mentioned above which would necessitate a Chinese wall defence. The legislation makes no provision for a Chinese wall defence and therefore Author would conclude that that even if there were a physical and operational segregation of functions in a company, should one employee be privy to inside information which may not have been shared with the investment department, however the investment department proceeded to deal in those shares, the company would be held liable for committing the offence of insider trading.

The Chinese wall defence is therefore an aspect that should be considered for incorporation in our current legislation to allow for a more complete inclusion of the aspect of a juristic person as an offender.

5.4 CIVIL REMEDIES FOR INSIDER TRADING

The Corporations Act provides for civil sanctions and civil penalties against those who contravene insider trading prohibitions. Any person who violates the insider

trading provisions will be liable to compensate any person who fell victim to the insider trading for the losses he or she may have suffered.[122]

In terms of Section 1043L(1) of the Corporations Act it should be noted that it does not appear that a contravention of section 1043A(2) is included in the offences for which the civil remedy is applicable, as the provision makes specific reference to the contravention of section 1043A(1) only.

Wherefore in addition to this, section 1317HA makes provision for a civil penalty. More specifically, section 1043L(2) specifies in what instances one may make use of the remedy available in section 1317HA and what may be claimed therefore. The issuer under section 1317HA may recover as compensation the difference between the price at which the products were applied for, or agreed to be applied for, by the insider or the other person and the price at which they would likely have been disposed of in a disposal made at the time of the application or the time of the agreement as the case may be, if the information had been generally available.[123] It is interesting to note that this action may be taken against the insider himself, the other person (who may have purchased the disposer's financial products) or any other person involved in the contravention as a whole.

Section 1043L(3) the provides the same remedy to the disposer rather than an issuer and section 1043L(4) to an acquirer. The Australian Securities and Investment Commission (ASIC) tasked as the Australian national corporate regulator may, where it is considered to be in the public interest, bring an action of and for the benefit of someone affected by the insider trading in accordance with subsections (2)-(5) as well as of and for the benefit of an affected body corporate to recover civil damages.[124] This is usually employed when issuer's board of directors was unwilling or unable to act, especially when the insider involved holds some sort of influence of the board.

[122] Section 1043L of the Corporations Act.
[123] Section 1043L(2) of the Corporations Act.
[124] See s 1043L(6)-(9).

It should also be noted that different monetary maximum penalties are imposed for individuals and corporations who contravene insider trading regulation. In terms of an individual the court may impose a pecuniary penalty of up to the greater of

(a) A$1.05 million; and
(b) Three times the total value of the profits made or losses avoided that are reasonably attributable to the contravention.[125]

Whereas for corporations, the court may impose a pecuniary penalty of up to the greater of:

(a) A$10.5 million
(b) Three times the total value of the profits made or losses avoided that are reasonably attributable to the contravention and
(c) 10 percent of the corporation's annual turnover calculated in the year preceding the contravention, which is however limited to a maximum of A$525 million.[126]

As previously stated in Chapter 3, the monetary benefit gained, especially by a company; from the actual insider trading activity may surpass and/or be well worth the administrative fee or settlement fee imposed by the FSCA. In cases where the courts may actually access even just 10 (ten) percent of the company's turnover, Author argues that such an order will be more greatly felt by a company. South Africa should therefore first consider making a distinction on the penalties that may be order against individuals as opposed to company's and indeed consider the possibility of including a percentage of the company's turnover in the penalty ordered against the offending company.

As a whole, in terms of the civil remedy available to an Australian issuer, disposer and acquirer who suffered damage as a result of insider trading, South Africa does not have any such remedy available to these persons. Instead, after a matter is lodged with the FSCA and then referred to the Enforcement Committee, the Enforcement Committee will then impose an administrative sanction against the

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[125] https://thelawreviews.co.uk/edition/the-securities-litigation-review-edition-6/1227510/Australia last visited on 1 October 2020.
[126] *Ibid*.

offender up to a maximum of R50 million. Any person who was affected by the insider trading activities enforced against may then claim part of the proceeds as compensatory damages against the FSCA.[127] The lack of an available independent civil remedy for aggrieved persons who have suffered damaged as a result of insider trading activities not only puts more strain on the FSCA being the only body bringing a form of civil claims against offenders however it also limits the remedies available to aggrieved persons as whole. Should the Regulator be unsuccessful at enforcing the charges against an offender and fail to make any settlement, an aggrieved person's claims will consequently fall away and one would go uncompensated as a result, regardless of the damage he may have suffered. South Africa should therefore consider making civil remedies available to persons other than the Regulator for more effective and broad sanctioning mechanisms that can be taken against offenders.

5.5 THE REGULATORS

Like the FSCA, the ASIC has various responsibilities such as the investigation of any criminal matters involving corporate law (inclusive of this is insider trading activities) and to prosecute these contraventions in terms of the ASIC Act of 2001[128] and the Corporations Act.

Additionally, similar to the FSCA, the ASIC is empowered to refer any serious or complex criminal matters to the Commonwealth Director of Public Prosecutions in accordance with a memorandum of understating between the parties. The ASIC may further bring such criminal proceedings following the institution of civil penalty proceedings for the same conduct, however where a person has been convicted of a criminal offence for the same conduct, no civil penalty proceedings may then be instituted against him.[129] Wherefore unlike Australia, the Financial markets Act does not make provision for the FSCA in addition to administrative proceedings; to bring its own criminal proceedings against an insider trading offender without first referring

[127] Chitimira "Overview of the Available Remedies for Market Abuse Victims under the Financial Markets Act 19 of 2012" 2014 *MCSER* Vol 5 No.8 129.
[128] See s 49 of the ASIC Act- s49(2) summarily states that the ASIC may cause a prosecution of the person for the offence committed against corporate legislation to be begun and carried on.
[129] Chitimira "The Regulation of Market Manipulation in Australia: A Historical Comparative Perspective" 2015 *PER/PELJ* (18)2 123.

such proceedings to the Director of Public Prosecutions and the relevant courts, which in contrast is a remedy available to the ASIC.[130] The FSCA may only bring its own criminal proceedings against an insider trading offender or market manipulation offender if the Director of Public Prosecutions refuses to prosecute the specific market manipulation case referred to it by the FSCA.[131]

The ASIC has much greater powers conveyed upon such as the following:

(a) Make an order in relation to securities, for example restraining persons from disposing or acquiring interests or exercising voting rights;[132]
(b) Disqualify a person from managing corporations for up to five years in defined circumstances;[133] and
(c) Issue an infringement notice for an alleged breach of the provisions of the continuous disclosure requirements.[134]

In addition to the above, the ASIC has the power to access telecommunication records and make an application for a stored communications warrant in terms of section 110 of the Telecommunications (Interception and Access) Act of 1979 (Telecommunications Act). This is done by requesting the Federal Police to do so provided that certain requirements. Incisive of these requirements is that the information that would likely be obtained by intercepting the calls would likely assist in connection with the investigation by an agency of a serious offence in which the particular person is involved or another person is involved with whom the particular person is likely to communicate with using the phone service.[135]

In terms of section 5D(3) of the Telecommunications Act, a serious offence in relation to company violations are offences that involve an offence punishable by imprisonment for life or for a maximum period of at least seven years. As insider trading is an offence punishable with a possible maximum imprisonment of up to ten

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[130] Chitimira 2015 *PER/PELJ* 125.
[131] Section 84(1) of the FMA.
[132] See s 72 and 73 of the ASIC Act.
[133] See s 206F of the Corporations Act.
[134] See s 1317D of the Corporations Act.
[135] Duff "Insider Trading: Addressing the Continuing Problems of Proof" 2009 *Australian Journal of Corporate Law* 23 170.

years[136] as opposed to the previous maximum imprisonment of five years, it therefore fell within the ambit of the provisory section though it previously did not before the maximum sentence was then accordingly amended.

None of the aforementioned powers are however available to the FSCA thus almost limiting its powers to administrative penalties and possible criminal proceedings. In cases involving market manipulation, Author is of the view that the powers and remedies available to the FSCA should be creative and not limited to mere normal and rigid investigative procedures and/or monetary or criminal penalties. Powers such as being able to disqualify one from being a director of a corporate entity could possibly add to deterring persons from committing insider trading activities as the possibility of not being able to jump ship and join another company as director for the next 5 years may be frightening. South Africa should indeed consider conferring more powers and remedial actions that can be taken by the FSCA to better improve on doubling down on persons who contravene, not only insider trading regulations but market manipulation prohibitions as whole.

5.6 CONCLUSION

Australia has managed to better define concepts surrounding insider trading. It has also made provision for the distinction between an individual and juristic person who has contravened insider trading provisions and has applied different monetary penalties for each. In addition to this, it has made provision for defences that can be available to juristic persons such as the Chinese Wall defence. This is to cater for the fact that juristic persons cannot merely be held liable due to an individual in the company having had inside information whilst the company may have been physically and operationally segregated from that person and thus not having being privy to the inside information in that individual's possession when the company dealt in the listed security. Various civil remedies are available to aggrieved persons and the ASIC is even empowered to lodge such proceedings on behalf affected persons if same is in the interest of justice. Likewise, the ASIC has an array of powers conferred upon it which enables them to be more effective at discharging of their

[136] Thomson "A Global Comparison of Insider Trading Regulations" 2013 *ISSN* Vol. 3 14.

duties. Majority of these provisions and mechanisms should be adopted by South Africa in attempts to better the regulation, supervision and enforcement of insider trading in the country. Author however argues that remedies such as the Australian Regulator's power to access offenders' telecommunication records may not be suited for inclusion in the current South African legislative framework pertaining to insider trading as this remedy does not seem available even in the prosecution of serious criminal offenses in the country. South Africa may however consider the inclusion of civil remedies for aggrieved persons who suffered damage due to insider trading activities, improvements in the Financial Markets Act in terms of the definitions relating to insider trading, providing for a Chinese wall defence and different monetary penalties for individuals and juristic persons as well as conferring greater and more creative disciplinary powers on the FSCA to better regulate the insider trading.

CHAPTER 6
CONCLUSIONS AND RECOMMENDATIONS

6.1. ASSESSMENT OF THE RESEARCH

This research aimed to assess how effective the current South African legislation at combating insider trading is and what mechanisms or provisions can be adopted from foreign law to better the legalisation and its practical application in the country. This was done by addressing definitions which pertain to and surround the concept of insider trading in South Africa in Chapters 1 and 2. The research then analysed South Africa's legislation as whole that governs insider trading in Chapter 3 and reviewed the current statistics of successful prosecutions by the courts and enforcements by the Financial Sector Conduct Authority of insider trading activities by alleged offenders in Chapter 4. Chapter 4 then further discussed the FSCA's role in the supervision and enforcement of insider trading activities in South Africa and Chapter 5 proceeded to compare the insider trading legislation of Australia to that of South Africa.

In the above discussions an important aspect in answering the research questions are the statistics of successful enforcements of insider trading violations by the FSCA which proved to be quite low since inception of the insider trading regulations and the inclusion of the FSCA as a vital supervisory and enforcement body against market manipulation.

6.2. CONCLUDING REMARKS

Insider trading regulations in South Africa have made strides since their initial enactment. The legislature indeed saw the need to improve on it as seen by the various re-enactments of the provisions relating to the prohibition and the repeal and enactments of new legislation that governs it. The current legalisation however fails to adequately define certain concepts relating to and/or surrounding insider trading which has led to ambiguity for interpretative purposes and difficulties in its practical application. The definitional lacuna in the legalisation can be rectified by defining terms

such as “material effect” as is the case with the Australian Corporations law [137] and various terms that remain undetermined in the legislation.

Notwithstanding the definitional issues presented by the Financial Markets Act, the Act also falls short in various aspects such as confining the main prosecutory function to the Director of Public Prosecutions and its failure to consider the creation of specialised courts specifically mandated to hear market manipulation cases to avoid the unnecessary delays that may be caused by the backlogs in the criminal courts. Additionally, the Act’s limitation to listed securities only, opens up the unlisted securities environment to avoidable abuse, with little to no consequences experienced by the offender. All these downfalls in turn, contribute to the hinderance of the FSCA’s supervisory and enforcement responsibilities evidenced by the lack of successfully prosecuted cases by the courts and the FSCA as indicated. The considerable number of successful insider trading settlements and prosecutions that have been obtained in Australia could imply that the penalties available to Australians are relatively better catered for and/or better utilised than those in South Africa.[138]

Holistically, the courts have had to heavily rely on foreign law to help navigate their way through the loopholes and uncertainties which stem from the current legislation pertaining to insider trading. As it stands therefore, the current legislation does not adequately provide for measures that reasonably curb the offence of insider trading.

6.3 RECOMMENDATIONS

In light of the challenges presented by the current legislation, the author makes the following recommendations regarding the amendments that can be made to the current legislation and the mechanisms that can be adopted to better regulating and enforce the prohibition of insider trading (and perhaps market manipulation as a whole) in the country:

[137] Corporations Act, 2001.
[138] Chitimira 2015 *Speculum Juris* 105.

- Provide for fully defined terms and/or guidelines or examples of certain concepts such as “material effect” and “inside information”. In light of the Australian comparative study conducted above, inside information in South Africa could be defined as information which is not generally available to the public and if the information were generally available, a reasonable person would expect it to have an effect on the price or value of financial products. As material effect is not defined in South Africa’s legislation governing insider trading, this definition arguably evades the need to define the term “material effect” and also avoids the possibility of one committing the offence of insider trading, however not being held liable for the offence as the effect resulting therefrom may have been a minor one.

- The introduction of aids such as whistle blowing, specific insider trading courts or tribunals as well as the addition of arbitration and alternative dispute resolution mechanisms therefore.

- The inclusion of attempted insider trading as an offence in the legislation. Author argues that in cases where one attempts to commit the offence of insider trading and fails, as the intent to commit the offence remains, same should be punishable as a further attempt to deter the commission of the offence and avoid instances where the failure to commit the offence though attempted, inadvertently results in a defence therefore.

- The inclusion of different penalties for individuals and juristic persons, which penalties for juristic persons may include accessing the offending company’s annual turnover in the calculation of the penalty imposed.

- The review of current criminal penalties to be more robust and stricter so as better deter an insider from committing the offence.

- Equipping the FSCA with its own surveillance systems to detect and curb insider trading activities in South Africa so as to mitigate its heavy reliance on the JSE’s surveillance department and thus avoid time delays in the

investigation, settlements and prosecution of insider trading cases by the FSCA.

- Adopting the Chinese wall defence to adequately cater for defences available to juristic persons as potential insiders. As previously mentioned in Chapter 5, the Chinese Wall defence is created as a fair and logical defence for instances where there is a physical and operational segregation of functions within a juristic person such as a company. As the Chinese Wall prevents information from flowing from one department to another, the defence itself could assist with a juristic person avoiding liability for insider trading merely due to some employees having inside information which the persons who actually dealt in the regulated securities within the same entity may not have been privy to when dealing. Author argues that although the Securities Services Act and now the Financial Markets Act was progressive enough to include juristic persons as possible offenders who can be held liable for contravening insider trading prohibitions, it has left the juristic person with little to no form of recourse in instances where one department with inside information is completely segregated from the other that actually to deals in the regulated securities.

- Providing for civil penalties and remedies to individuals who suffered damage as a result of an offender's insider trading activities. This not only provides for an array of possible remedies available to aggrieved persons but also helps avoid the high evidentiary burden required in criminal courts as the evidentiary burden in such civil cases will be on a balance of probabilities.

- Conferring innovative and vast powers on the FSCA in its enforcement against insider trading such as the power to disqualify a person from being appointed as a director for 5 years or however many years as the legislature may deem fair and reasonable, to better assist the FSCA with executing its duties.

Though the adoption of the above mechanisms may not necessarily be a sure win and lead to the perfect regulation, supervision or enforcement on insider trading in South Africa, it may at least be a step in the right direction.

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